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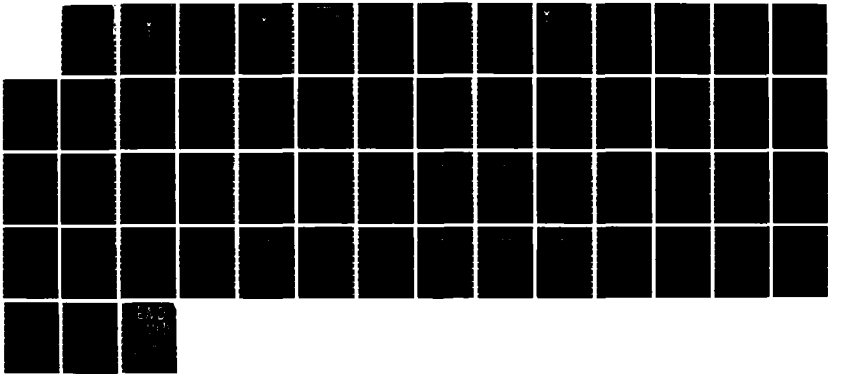

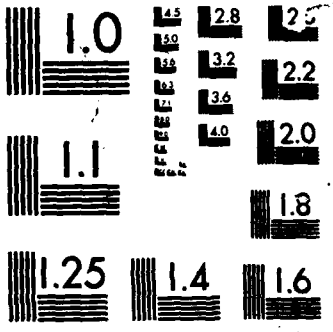

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AD-A166 690

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STUDENT REPORT

INTERNATIONAL TERRORISM AS A LAWFUL FORM OF WARFARE: AN IDEA WHOSE TIME SHOULD NOT ARRIVE

MAJ JOHN G. HUMPHRIES 86-1200

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REPORT NUMBER 86-1200

TITLE INTERNATIONAL TERRORISM AS A LAWFUL FORM OF WARFARE: AN IDEA WHOSE TIME SHOULD NOT ARRIVE

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Submitted to the faculty in partial fulfillment of requirements for graduation.

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The United States is facing a significant challenge worldwide from terrorism. The challenge comes from the international scope and the state sponsorship involved in contemporary terrorism. In fact, international terrorism is increasingly referred to as a new form of warfare. The law of armed conflict, however, excludes terrorists as lawful combatants and terrorism as a legitimate type of warfare. Customary international law prohibits state sponsorship of terrorists and their activity. Protocol I to the Geneva Conventions attempts to redress the law of armed conflict. The Protocol affords certain terrorists treatment as lawful combatants rather than common criminals. Protocol I also absolves nation states of any liability to other governments arising from its support of terrorism. This analysis evaluates the legal consequences of adhering to the customary international law outlawing terrorism and of ratifying Protocol I to legalize terrorism in wartime. The study concludes that it is not in the United States' national interest to recognize terrorism as an acceptable warfare strategem.

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PREFACE

When Libyan ruler Col Moammar Khadafy announced to the world in January of 1986 that his nation could go to war at any time to combat the "state terrorism" of the United States, his remarks paradoxically intimated what is reality in today's world community. For over two decades, the United States and its Western allies have seen terrorism kill and maim thousands of their citizens. And there are no bright prospects for an end to terrorism. As Libya and other Arab countries have proclaimed, so long as the question of Palestinian independence remains unresolved the world will have to expect more terrorism. With the assistance, support, encouragement, and toleration provided from established governments, international terrorism has become a strategy against Western democracies.

In the face of this inexorable onslaught, experts, pundits, and government officials worldwide refer to terrorism as a form of warfare. Third World nations and the Soviet Union have sought to legitimize "wars of national liberation" and the terror tactics they use. The United States, however, has not succumbed to these notions.

The question begs an answer: Is it in the United States' best interests to accept the view that international, state-sponsored terrorism is a lawful form of warfare? This paper seeks to answer this question by explaining how the law of armed conflict applies to international terrorism, what constitutes state-sponsored terrorism and what its current legal standing is under customary international law, and how recent attempts to recodify the law of armed conflict have sought to legitimize terrorism.

I would like to thank Miss Jane Gibish, Air University Library and Mr William C. Younger, Alabama Supreme Court Librarian, and his staff for their support in providing research materials. My thanks also goes to Lt Col Roger A. Sindle for his assistance in completing this paper.

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REPORT NUMBER 86-1200

AUTHOR(S) MAJOR JOHN G. HUMPHRIES, USAF

TITLE INTERNATIONAL TERRORISM AS A LAWFUL FORM OF WARFARE: AN IDEA WHOSE TIME SHOULD NOT ARRIVE

I. Problem: During the past two decades, international terrorism has increasingly threatened, endangered, and destroyed the lives and fundamental freedoms of innocent peoples. The United States and its citizenry have become the primary target of international terrorism. It has become popular to refer to international terrorism as a form of warfare. In fact the drafting of Protocol I to the Geneva Conventions has attempted to legitimize terrorism as a means of conducting war whenever the group resorting to terrorism is fighting for self-determination. While the United States has officially opposed accepting international terrorism as a lawful, acceptable means of warfare, the question arises whether it is in the United States' best interests to continue to do so.

II. Objectives: In view of the foregoing question and the imperative need for an answer, this paper examines several areas. First, it examines the law of armed conflict and establishes the current status of international terrorism under that law. It then examines how the concept of "wars of national liberation" and Protocol I to the Geneva Conventions have impacted the law of armed conflict. Next, this paper looks at the legal status of state-sponsored, international terrorism and how the law of armed conflict applies to states who sponsor terrorism.

CONTINUED

III. Discussion of Analysis and Findings: The Geneva and Hague laws have long established that there are limits as to the means of causing permissible death and destruction in warfare. The doctrine of military necessity and its corollary principles of discrimination and proportionality circumscribe how force is applied against combatants and non-combatants, regardless of the participants' goals. Thus, each party to an armed conflict is assured that military operations will occur within certain legal parameters. It is clear, then, the law of armed conflict prohibits terrorism as an intentional strategy. Many of the perpetrators of international terrorism have claimed an exemption from this prohibition due to their participation in "wars of national liberation." Protocol I legitimizes this kind of war and any other conflict whose aim is self-determination; it categorizes them as international armed conflicts in which the participants become lawful combatants entitled to prisoner of war status when captured. This would permit terrorists to be prosecuted under the "grave breaches" provision of the Geneva Conventions. Protocol I, however, has neither been ratified nor sufficiently adhered to so as to supplant and become customary international law. State sponsorship of international terrorism is also proscribed no matter what political motivation the terrorists claim. International law requires every state to refrain from organizing, instigating, assisting, or participating in terrorist activities. States that support international terrorism face liability involving the whole panoply of sanctions under international law. Recent practice suggests, however, that nations who violate international legal precepts proscribing terrorism are essentially immune from penalty. Similarly, the terrorists who receive this support have operated beyond the reach of international law.

IV. Conclusions: In view of the significant levels of international terrorism, the United States should not join the practice of treating terrorism as a lawful means of warfare. Although terrorists could be prosecuted for "grave breaches" if terrorism were lawful during an armed conflict, the international community has evinced a lack of will to confront terrorism and its actors at any level. So the advantage the law accords to civilized nations is, in fact, no advantage. The essence of international terrorism is its commission during peacetime and those criminal offenses are prosecutable under the municipal laws of every state. Thus, no political or military benefit inheres to the United States, for its military neither engages in terrorism nor supports irregular forces that do. Additionally, it is probable that relaxing the law of armed conflict would decrease the protections currently afforded to combatants and civilian alike. When today's irregular forces disguised as civilians become tomorrow's enemy in the battle area, a state's regular soldiers sometimes cease distinguishing between armed irregulars and genuine

noncombatants. Present rules of distinction, when conformed to, reduce the incidence of noncombatants being killed.

V. Recommendations: The United States should not treat international terrorism as a lawful form of warfare. Likewise, it should refuse to ratify Protocol I to the Geneva Conventions. It must continue to seek consensus among its Western allies in applying sanctions against states which sponsor terrorists and in prosecuting individual terrorists.

INTERNATIONAL TERRORISM AS A LAWFUL FORM OF WARFARE:

AN IDEA WHOSE TIME SHOULD NOT ARRIVE

> There are no political or geographical boundaries or moral limits to the operation of the peoples' camp . . . . In today's world, no one is innocent, no one is neutral.[1]

> [T]errorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent . . . .[2]

The United States needs a clear understanding of the threat posed by international terrorism. Basic to this understanding is the overwhelming evidence that international terrorism is a kind of strategic conflict, which, while not directly commanded by the Soviet bloc, cannot exist without their orchestration and support.[3] Terrorism is the one kind of conflict the Soviet bloc can fund, support, and direct in support of their objective to extend hegemony over the Third World.[4] The Soviets and the groups they support find terrorist campaigns attractive because they return the most impact at lower costs and risks: it is warfare on the cheap.[5] And so far, it has been proven impossible to defend against its random usage.

Ruling nuclear war out as unwinnable[6] and conventional war as improbable,[7] the Soviet bloc has resorted to promoting *regional conflicts* - "wars of national liberation" - in the Third World to envelop the West.[8] Besides extending Soviet influence in support of its expansionist foreign policy, these campaigns also seek to deprive the West of access to natural resources and minerals vital to strategic defense.[9] These campaigns use terrorism as a primary tactic, and include attacks on diplomatic and government officials.[10] Evidence of increased training, arms shipping, and financing of terrorists from the Soviet Union and its Cuban, Libyan, Syrian, and Iranian surrogates, among others, is incontrovertible.[11] This is not to contend all international terrorism is Soviet backed or inspired. Many non-aligned individuals and groups commit terrorist acts for any number of political reasons.[12] What confounds, however, is that the Soviet bloc's proclivity for coordinating and supporting international terrorism remains open to debate.

The upshot is that the Soviet Union will continue to use terrorism as part of its global strategy. The United States has rejected the popular notion that terrorism is a lawful, acceptable form of warfare,[13] and the Reagan administration has recognized the threat international terrorism poses to world stability.[14] In view of the Soviets' unwillingness to forego terrorism as a political instrument, the question arises whether the United States should align itself with the view that international terrorism is lawful warfare. Would adopting this position be in the best political interests of the United States? Would it be consistent with its standing as a law-abiding nation in the international community? Would doing so be in its best legal interests as

regards its standing to prosecute terrorists? In examining these questions, this paper will focus on the law of armed conflict and how it applies to international terrorist acts and state-sponsored terrorism.

First, it is useful to begin the inquiry with a general perspective of international terrorism in a definitional context and, then, examine the appropriate proscriptions of the law of armed conflict. From this background, examining the application of the law of armed conflict to terrorism will reveal the extent to which these rules cover the conduct of terrorists. Next, an exploration will be undertaken about the international law governing nations who knowingly and willingly support terrorist activity. Finally, this analysis will be used to draw conclusions whether it is in the United States' best interests to treat state-sponsored, international terrorism as a lawful means of warfare.

INTERNATIONAL TERRORISM: DEFINING THE PROBLEM

If ever a term has presented a definitional conundrum, international terrorism is that term. For every political analyst and international legal expert there is a different definition. In the same fashion, the literature on terrorism is as vast and unfocused as the definitions are numerous and nebulous. It is not the purpose here to explore the myriad definitional criteria extant.[15] In the absence of a universally agreed upon definition of international terrorism, however, a general definitional structure is necessary not only to permit a common understanding with the reader, but also to move beyond a review of the rules of international law to an examination of their application in international relations.

In this regard, Professor Paust's formulation of the "terrorist process" provides the most appropriate framework. He views international terrorism as one kind of violent strategy employed to alter others' freedom of choice.[16] This "terrorist process" uses violence or the threat thereof against an instrumental target to convey to a primary target a threat of future violence to coerce the primary target into behavioral or attitudinal political changes.[17] Instrumental and primary targets can be the same group of persons or a person.[18] The instrumental target, however, may be one other than human beings; for example, a hydroelectric dam.[19] Whether a particular "terrorist process" is international in scope depends on the arena in which the violence occurs. Terrorism becomes international in scope when it is (a) directed at foreign citizens or foreign targets; (b) conspired in by the governments of or factions of more than one state; or (c) aimed at influencing the policies of a foreign government.[20]

Using this definitional view, this paper analyzes two aspects of international terrorism of present concern to the United States: (a) the application of the law of armed conflict to acts of international terrorism and (b) the application of international law to "state-sponsored terrorism." Several points of clarification are necessary. First, in discussing "state-sponsored terrorism," the use of that term is limited. It does not address the kind of egregious governmental terror used to squelch internal

political enemies, the paradigm of which Solzhenitsyn described in The Gulag Archipelago. Second, one cannot properly assess state-sponsored terrorism as a lawful means of warfare without first examining the role of individual terrorists. Third, one must bear in mind that the law of armed conflict comprises a branch of international law. Finally, the following discussion of how the law of armed conflict regulates terrorism is based on the customary international law under which all nations are presumed to conduct their affairs. Any attempts to change this law are noted as appropriate.

THE LAW OF ARMED CONFLICT AND THE REGULATION OF TERRORISM

The "Law of the Hague"[21] and the "Law of Geneva"[22] are considered the basis of the law of armed conflict, traditionally known as the law of war. This law applies in all cases of declared war or any other conflict arising between signatories even if the state of war is not recognized by one of them. The Hague law lays down the rights and duties of belligerents in conducting operations and limits the methods of warfare. It encompasses the 1907 Hague Conventions, and the international customary obligations practiced among nations.[23] Its primary functions seek to lessen the brutality and savagery of armed conflict, and limit the scope of any conflict.[24] The Geneva law, on the other hand, is fundamentally humanitarian in nature. It ensures the protection and humane treatment of war casualties, prisoners, and non-combatants.[25]

Since its formation in the aftermath of World War II, the United Nations has sought to limit the frequency of armed conflict in which these laws apply. The U.N. Charter permits the use of armed force only in the pursuit of self-determination, collective security,[26] and self-defense.[27] The right to use force in these three U.N. categories, however, is not unlimited. Valid international legal authority recognizes that there are limitations on the use of force.[28] Besides the positive law in the Hague Conventions, the 1949 Geneva Conventions affirm the peremptory norm prohibiting international terrorization of civilians and any strategy designed to produce terror that is not incidental to combat. These conventions contain a specific proscription of "all measures" of terrorism.[29] A basis for these norms lies in the legal concept of military necessity.

Military Necessity and Related Considerations

The doctrine of military necessity in armed conflict is indispensable to limiting the nature of conflict. Taken to its logical extreme, this concept means that any act during conflict advantageous to one of the parties can be justified on that basis. This is tantamount to saying that military necessity cannot be limited by any legal obligation limiting a party's freedom of action. This contention ignores, however, the conspicuous precept that attacks are legitimate only when directed against military objectives, whose total or partial destruction would constitute a definite military advantage.[30] Consequently, the concept of "lawful objective" limits what targets may be legitimately pursued as a military necessity in a conflict.[31] Therefore, terrorism during armed conflict runs counter to the principle of the distinction between lawful and unlawful objectives.[32]

Moreover, terrorism perpetrated by military or civilian agents of a state violates the law of armed conflict because there is scant or no effort to distinguish between combatants and innocent civilians.[33] This rule against indiscriminate attacks is of such fundamental importance that it is impossible to ignore. This principle holds that armed forces personnel are the only legitimate human objectives and that civilians in groups or alone are not. It is so well established and permanent that until recently it was beyond argument.

The law of armed conflict further holds that there is not an unlimited right as to the means adopted for injuring the enemy. Weapons and methods of warfare likely to cause excessive suffering are prohibited. This means the methods of fighting as well as the objectives are limited, since the destruction of a particular objective may be a means to injure an enemy.[34] This rule has outlawed the use of chemical weapons, biological agents, and certain kinds of projectiles and explosive devices in an armed conflict. The rules relating to the latter two categories mean that explosive bullets, expanding (dum-dum) bullets, and projectiles releasing asphyxiating gases are prohibited. In armed conflict, these obligations cannot be abrograted even if there exists conditions considered to be an overriding necessity.[35] As a result, certain methods of warfare may be prohibited because of their indiscriminate effects.

Likewise, the principle of proportionality buttresses the concept of military necessity. As a general rule, this principle limits attack only against lawful military objectives with weapons and methods adapted to those objectives.[36] As a consequence, indiscriminate terrorist attacks on civilian noncombatants are rendered illegal. This rule imposes other obligations as well. It requires soldiers to refrain from cruel or treacherous behavior. This kind of behavior involves acts leading an adversary to believe he is entitled to protection under international law, combined with an intent to betray that misplaced belief.[37] Among such acts that terrorists might use are the feigning of distress through the misuse of an internationally recognized protective sign, or the feigning by combatants of civilian, noncombatant status.

Beyond these rules regulating the use of force, the law of armed conflict requires armed forces personnel to wear a fixed distinctive sign recognizable at a distance. As Professor Greenspan notes, this is usually fulfilled by the wearing of a military uniform to set soldiers apart from the general population. This rule applies equally to regular soldiers and groups of irregular forces.[38] Where a complete uniform cannot be worn because of a group's poverty or other reasons, the fixed distinctive sign must be something that cannot be removed at will. Any rule to the contrary would permit a combatant to appear to be a peaceful citizen one moment and a soldier the next. This qualification makes it unlikely that any terrorist group or its members can qualify as lawful belligerents, the latter subject to be discussed in greater detail shortly.

In addition to these prohibitions, the Geneva Convention protecting civilians in time of war codifies another category of prohibited conduct in the customary law of armed conflict. It expressly prohibits "the taking of hostages."[39] Terrorists frequently seize civilian hostages in their operations, so this is another limitation the law of armed conflict would impose on terrorism.

With these essential, though somewhat tedious, determinants of the law of armed conflict in mind, we can next examine the legal precept of belligerency. After this, a further application of military law to terrorism will follow, together with a consideration of the impact of Geneva Protocol I and "wars of national liberation" on these matters.

Belligerency and Its Legal Effect

A belligerent in an armed conflict is a state or other entity engaging in an armed conflict.[40] Belligerent status among states exists when an armed conflict exists in fact.[41] There no longer is a need for a formal declaration of war or for a recognition of a state of war to attain this status; the factual existence of an armed conflict is sufficient.[42] Even in the absence of either a declaration of or recognition of war, the obligation to comply with the law of armed conflict remains.[43]

The legal effect of belligerency status is that the hostilities become international in character, and the conduct of all belligerents is regulated by the law of armed conflict.[44] The international legal community, however, has not considered random, intermittent incidence of attack to give rise to a de facto existence of armed conflict.[45] As shall be seen, this consideration is central to determining the belligerent status of terrorist groups.

Another aspect of this legal concept is the traditional view that the law of armed conflict does not apply to hostilities not of an international character, that is, conflicts between nationals of a state occurring solely within that state's boundaries.[46] International law generally permits only states to attain belligerent status. The Geneva Conventions of 1949 modified this principle to permit insurgent groups of irregular combatants who are able to exercise governmental authority over substantial territory of a state to achieve "belligerent status."[47] It is clear that international law requires a high level of military activity and some measure of success in controlling territory before being concerned with local insurgencies. In the absence of achieving these standards, an insurgent group cannot attain belligerent status and remains involved in a non-international armed conflict governed by common Article 3, of the Geneva Conventions, and local municipal law.

Terrorism and Protocol I to the Geneva Conventions

Protocol I to the Geneva Conventions intends to modify international law to render terrorism a lawful means of warfare. Article 1, Section 4, exempts from legal prohibition "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the

exercise of their right of self-determination."[48] While international law generally applies only to nation-states and their activities in the world community, the law of armed conflict comprises an exception to that principle. The Laws of the Hague and Geneva are neither intended as criminal statutes nor serve any direct function as criminal statutes. They serve as international legal obligations binding on states. States, in turn, are obligated to implement and enforce on their own combatant personnel the law regulating armed conflict. Through this regimen, the law of armed conflict imposes rights and responsibilities on combatants. If terrorism were accepted as a lawful form of warfare, treatment of terrorists acting against the United States and its citizenry would change. Comparing and contrasting how they are treated under the law of armed conflict versus how they would be treated under Protocol I is instructive. Such examination can assist in providing insight whether the United States should ratify Protocol I and join in accepting terrorism as a legitimate form of warfare.

Treatment Under the Laws of Armed Conflict.

In analyzing how the law of armed conflict applies to terrorism, assume the condition of belligerency exists between the United States and another nation, for instance, Mexico.[49] Assume next that a terrorist from or acting on behalf of Mexico commits acts of terrorism against the nationals and property of the United States in Texas in support of a national liberation movement to gain Texas' independence. These intentional terrorist acts are violations of the law of armed conflict because they violate the rules of military necessity and of distinguishing between lawful and unlawful objectives.

Further, terrorist acts of violence or deprivation of liberty against American civilians taking no part in the hostilities may constitute "grave breaches," which is a category of offenses indictable as war crimes.[50] This "grave breaches" category covers many areas, including murder, summary executions, torture of protected persons, terrorist attacks against civilians, and the taking of hostages.[51] The significance of the law's treating terrorism as a grave breach is that the offenses are made universal crimes within the jurisdiction of all parties to the Geneva Conventions, not merely the parties directly involved in the armed conflict.[52] If the Mexican offenders fled to, say, the Dominican Republic, a signatory to the Geneva Conventions, the Dominican government could prosecute them or extradite them to the United States as the requesting state. The universality of the duty to prosecute persons alleged to have committed grave breaches extends even to the state the offenders purported to serve-Mexico-in this case.[53]

Terrorist attacks on U.S. military installations and personnel are not per se prohibited. There are general prohibitions against the use of poison, assassination, and the refusal of quarter, regardless of the combatant or noncombatant character of the target.[54] It is arguable that these attacks striking American military personnel anytime, anywhere are also grave breaches. This arises from the law of armed conflict's general ban on "unnecessary suffering," and "treacherous" killing or wounding of individuals.[55] These restrictions significantly regulate terrorism on the battlefield as well as in the rear areas.

Beyond these considerations, a combatant's character as a privileged or unprivileged member of an armed force is important. His status as a privileged combatant depends upon his membership in a regular armed force or the legal equivalent. In this context, a terrorist group's indiscriminate use of force is relevant to its claim of privileged status. Attacking non-military targets and civilians is evidence disproving a group's claim that it fulfills the requirements of irregular armed forces to be treated as a privileged force.

To achieve this privileged status under the customary law of armed conflict, members of irregular forces must be under responsible command, wear distinctive insignia or uniforms recognizable at a distance, carry weapons openly, and conduct operations in accordance with the laws and customs of armed conflict.[56] Considering that stealth is primarily important in irregular war and that irregulars usually remain concealed prior to attack, the requirement to carry arms openly while confronting the enemy is probably more verbiage than substantive. More important, though, is that prisoner of war status is conditional upon one's satisfying these requirements, for the law has long recognized the grave personal risks civilians face when forces vulnerable to attack from irregular combatants cannot, in moments of danger, distinguish actual or potential opponents from the general populace.

Generally, one who does not fulfill these conditions is an "unprivileged combatant" subject to prosecution as a common criminal under the municipal laws[57] in most nations.[58] This consensus rule is not necessarily followed in the United States. American court decisions indicate the law of armed conflict contains sufficient authority for prosecuting unprivileged belligerents before a military commission and condemning them to death without reference to municipal laws.[59]

The consequences of using terrorist tactics effect entitlement to prisoner of war status as well. Members of liberation movements, self-determination groups, or anti-colonial and anti-racist forces, who use terrorist violence, are not entitled to prisoner of war treatment upon capture because they have failed to adhere to the fourth condition of Article 4.[60] Therefore, any member of these groups who commits an attack upon civilians or upon regular armed forces personnel may be tried as a war criminal. What is more, an individual fighter is unprivileged under the Geneva Conventions if the group to which he belongs violates the law of armed conflict, even if he is not implicated in that violation.[61]

Treatment Under Protocol I.

Geneva Protocol I relaxes these rules significantly. It has a section entitled "Combatant and Prisoner of War Status."[62] The approach of this section creates a single set of rules governing all combatants, regular and irregular alike. For its members to be eligible for prisoner of war status if captured, a group requires only responsible command, open possession of arms while in the presence of its enemy, and the existence of a disciplinary system to enforce the law of armed conflict.[63] This formulation abandons the requirement for a combatant to wear a fixed, distinctive insignia to

distinguish him from the civilian populace. As a result, the risk of harm to civilians is immeasurably increased; everyone in the battle area becomes suspect as an enemy soldier or agent.

Because concealment to irregular forces is so material to the success of their operations, it is probable that irregular troops will not carry arms openly to distinguish themselves prior to and, at times, even during an engagement. An irregular who violates this rule of distinction under the customary law of armed conflict forfeits his prisoner of war status and can be prosecuted as a common criminal. Article 44 of this Protocol section, however, does not permit an opposing state to treat an irregular combatant as an entirely unprivileged one subject to prosecution under that state's municipal law. On the contrary, that state must accord him "protections equivalent in all respects to those accorded to prisoners of war . . . ."[64] And this article goes further. Its language appears to preclude prosecution of an unprivileged combatant as a criminal under a state's municipal laws.

This is an unsettling formulation. First, abandon the notion that combatants must wear insignia or uniforms; then, that they must carry their arms openly at all times; next, that they must comply with the rules of armed conflict; and, finally, that they will not forfeit their right to be treated as prisoners of war. These changes together with the claim of fighting against colonial domination, alien occupation, or a racist government carves out a huge safe haven in the law of armed conflict for terrorists.[65] This combination effectively confers immunity from prosecution upon any insurgent group acting against any state it considers oppressive. It would provide a measure of encouragement as well, for there exist few adverse consequences in the event of capture.

This construction of international law under Protocol I can only occur in situations in which a condition of belligerency exists and the laws of armed conflict apply.[66] In the absence of belligerency between parties, the members of an irregular force remain unprivileged. The treatment accorded captured international terrorists becomes a matter of the capturing nation's municipal law.

Penal Sanctions and Individual Combatants

Penal sanctions for unlawful behavior in armed conflict exist. One of these permits the prosecution of individual offenders for war crimes.[67] As previously mentioned, the Geneva Conventions oblige signatory nations either to prosecute persons alleged to have grave breaches before their own courts or transfer them to another concerned party for trial. The prosecution of individual war criminals has been invoked as a remedy only in the post-WW II trials of German and Japanese leaders. Where a "normal" criminal can escape to another state after committing his terrorist act, he is shielded by any extradition treaty exempting "political offenders" from prosecution. A combatant who commits a "grave breach" of the laws of armed conflict enjoys no such exemption. He remains subject to "universal jurisdiction" for prosecution for war crimes.

From this analysis, it is clear that, if the law of armed conflict is applied to terrorists acting on behalf of a state, those terrorists would be considered as war criminals. It follows therefrom a universal duty to prosecute these perpetrators, even on the part of the state they purported to serve.[68] On the other hand, if the terrorists are not acting on behalf of a state in any capacity, then their acts constitute normal criminal offenses under the municipal law of the state in which committed. This is the current legal position of the United States.

With the acceptance of Geneva Protocol I as binding international law, this analysis would change. Article 45 of the Protocol erects a subterfuge for terrorist groups behind which their members can seek legal protection. It happens in this way. Upon his capture, a terrorist can claim that his is a member of a group fighting a racist or colonial regime in fulfillment of his and his group's self-determination rights. The capturing state must accord prisoner of war status to the terrorist. He remains, however, amenable to prosecution for any war crimes he may have committed.

In much the same way that Protocol I would effect change in penal sanctions and other precepts of the law of armed conflict, a certain segment of the world community has sought to change that law through the United Nations and its declarations and through customary practice. The impetus for change comes in the popular notion of "wars of national liberation." Before examining state-sponsored terrorism, this subject deserves attention because of its impact on the law of armed conflict's potential application to terrorism.

Wars of National Liberation and The Law of Armed Conflict

The world community's failure to distinguish between the legitimate use of force as a means of last resort and the use of moral persuasion as a measure of first resort in conflict resolution has diminished the rule of international law so that national liberation movements have often provided the moral justification for terrorism.[69] Despite their claims to be "freedom fighters" or "guerrillas," not all terrorists fit those categories. On the other hand, even more "freedom fighters" or "guerrillas" are not terrorists. There is a distinction with a significant difference between guerrilla warfare and terrorism. Rebellion and revolution are lawful remedies in international law as long as they are conducted in accordance with legal precepts. Guerrilla warfare can be permissible warfare because its attacks are against legitimate military targets using proportional means of force. Terrorism is distinguishable in its attacks upon innocent civilians.

Despite the law of armed conflict's prohibition of terrorism, the United Nations has not generally supported that law. The use or threat of conflict is outlawed in the U.N. Charter. This rule is codified in the Charter: "All Members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[70] The Charter, however, permits the use of force in liberation movements seeking "self-determination."[71]

It should not surprise anyone that terrorism comprises part of the force used in seeking self-determination in today's violent world community. One U.N. civil servant claimed that "few if any nations have come into being or stayed alive without experiencing the phenomenon. . . referred to as terrorism."[72] Journalist I. F. Stone stated, "[T]here hasn't been a liberation movement in the world that didn't use terrorism. . . ."[73] These statements convey the tremendous ignorance there is about historical, political revolts and the use of terrorist force. One has only to witness the United States, Canada, Australia, Norway, and French West Africa as but a few examples of states arising from revolt but without resort to terrorism.

The United Nations' failure to distinguish between guerrilla warfare and political violence is evidence of the international community's inability or unwillingness to stand behind the basic human rights that international law recognizes.[74] That many Third World nations are recently formed makes no difference. It is well established that new states are required to respect the customary rules of armed conflict even though they neither participated in their formulation nor acceded to them afterwards.[75] The Soviet and Third World disregard of customary international law has not extinguished it.[76] Indeed, Syria's position typifies that of the Third World: International terrorism is of international concern only when it is employed solely for personal gain; acts committed in furtherance of a political cause, especially against colonialism and for national liberation, are to be supported legally and politically.[77]

Protocol I to the Geneva Conventions seeks to change how insurgent groups can attain belligerent status, elevate its conflict to the level of an international one, and, thereby, obtain international legal protections for its fighters -- whether soldiers, civilian agents, or terrorists. Protocol I mandates that wars of national liberation against colonial domination, alien occupation, or racially discriminating governments must fall within the category of international armed conflict.[78] It further erases the requirements for significant military activity and control of territory as a basis for applying international law. Claims of fighting against colonial domination, alien occupation, and racist regimes afford the members of a national liberation movement belligerent status: they become lawful combatants with prisoner of war privileges.[79] Furthermore, Article 96, paragraph 3, gives national liberation movements the right to declare unilaterally they are fighting a colonial, alien, or racist government. This conditional treaty making capacity is conditioned, however, upon prior ratification of Protocol I by the government against which the liberation movement is directed. Only forty-seven nations have ratified Protocol I, none of them the target of insurgency.

The reason for including various types of conflicts comprising wars of national liberation in Protocol I deserves explanation. A war of national liberation against "colonial domination" are those in which a colony rebels, as typified when its African colonies rebelled against Portugal. "Alien occupation" was inserted to gain the Arab states' support against the Israeli occupation of Palestinian territory. Dominant white governments in South Africa and Rhodesia (now Zimbabwe) are viewed as "racist regimes."[80] It was a

bloc of lesser developing nations supported by the Soviet Union and its allies, that attained special recognition for wars of national liberation in the United Nations. Now this notion has spread throughout the world community and threatens changes in the law of armed conflict.

Legal experts on irregular warfare have joined the cacophony to bring wars of national liberation under the umbrella of the law of armed conflict. First, they contend, although mistakenly, that wars of national liberation pass through progressive stages culminating in war waged by a regular army.[81] The argument continues by asserting irregular forces, in the first stages of a conflict, have only terrorist military tactics to which to resort.[82] Terrorism's use becomes a legitimate means of struggle because the motive of "self-determination" is a pure one receiving the preponderance of the world community's support.[83] Thus, a state can justify using terrorism against any innocent non-combatant against purported racist or colonial regimes in the name of self-determination.

These arguments fail, however, in view of several well-grounded precepts of international law and reasoning. To permit a state to say that a United Nation's majority vote will determine any outcome replaces the rule of law with the rule of the jungle.[84] Armed violence in whatever form remains violence, no matter what rhetorical context is used to justify it in the United Nations.

Other reasons why these arguments fail arise from the law of armed conflict itself. In the first stages of an insurgency when there is not yet an armed conflict, the law of armed conflict is not applicable.[85] Thus, it is unnecessary to discuss the conditions by which the members of an insurgent terrorist group acquires the privileged status of lawful combatants.[86] At later stages when an armed conflict occurs, terrorism contravenes the law of armed conflict because it violates both the principles of distinguishing between lawful and unlawful objectives and the rule of military necessity.[87]

In the final analysis, international law views political motives irrelevant in determining whether terrorist acts have occurred.[88] Similarly, the obligations imposed by the rules of "military necessity" and "proportionality" apply without reference to a determination of the justness of either side's cause.[89] Attempts to subvert these normative rules through United Nations' resolutions, legal commentators, and the Geneva Protocols have thus far failed. With these basic notions and norms of law in mind, we can turn to a consideration of state-sponsored, international terrorism.

INTERNATIONAL TERRORISM AND STATE RESPONSIBILITY

A problem with contemporary terrorism is that, when it is used as a means of warfare, it is often international in scope. Planning a terrorist campaign may happen in one state while the terrorists are armed and trained in another. And the terrorism itself may occur in yet another. Return to our previous scenario involving the Mexican liberation group with a few additional facts. Several Cuban advisors have joined the irregular force and more recently Palestine Liberation Organization (PLO) members have prepared for terrorism in

the United States. The first question is under what circumstances can the Mexican government be held responsible for terrorist acts committed within the United States' territorial limits by a group trained and armed in Mexico? The next is what are the United States' remedies for injury to its citizens and property? A variety of hypothetical situations are possible in our scenario. But the factual setting out of which terrorism arises holds the key whether Mexico is liable for any terrorist acts committed in the United States.

Under customary international law, states have a duty to refrain from organizing, assisting, financing, inciting, encouraging, or tolerating activities designed to spread terror in other states.[90] The decisions of international tribunals and the experience of state practice bear this out. More particularly, states have an obligation to deny the use of its territory as base of preparation and operation for terrorism.[91] The Texas Cattle Claims case, decided by the American-Mexican Claims Commission in 1942, is the leading case on this duty.

The claims arose from terrorist-type acts between 1860-1875.[92] These acts consisted of raids from Mexico into the United States by Mexican renegades and military personnel (with the knowledge of the highest Mexican government officials) and by the Kickapoo Indians and other tribes.[93] Among the claims were those in which the Mexican government was directly involved. The Commission concluded that a Mexican government official had led and supported the raids, and the raids constituted a "condition of outlawry."[94] Notwithstanding this knowledge, "the Mexican Government delayed . . . the taking of action necessary to terminate international wrongs."[95] As regards the Indian activities, the Commission held "the Mexican Government . . . failed . . . to put an end to the crimes against a friendly neighboring state.[96]

These findings analogously indicate the extent of state responsibility. When a government official participates in international terrorist activity, the state is unquestionably responsible. The state is also responsible when it allows terrorist groups to use its territory as an operations base from which to plan and train their personnel. State practice since World War II evinces "that State complicity in incursions by armed bands or toleration of activities of such bands operating from national territory is 'unlawful'. . . ."[97]

This duty extends further. It requires a state to use "due diligence" to prevent terrorists from basing their operations on its territory.[98] In determining whether a state has breached its international duty, its ability to prevent terrorist activities is subject to review. Current law holds whether a state can prevent the formation of unlawful activities is limited by the state's capacity to do so.[99] A related limitation hinges on a state's knowledge that terrorists are using its territory as a staging area or sanctuary. Finally, this concatenation of normative rules holds that a state may also incur liability due to its inaction: tolerating or acquiescing in the use of its territory renders the state liable.[100]

For example, to the extent that Lebanon permits a haven for the PLO on Lebanese territory, Lebanon is legally obliged to Israel to prevent this.

Under Lebanon's unstable government, however, it is obvious Lebanon cannot properly police its territorial limits to preclude the PLO from using its territory. Its inaction is due to its lack of capacity to do so, not to its actual acquiescence or toleration. Therefore, it appears doubtful that Lebanon could be held accountable under these circumstances.

Another highly developed area of international law relates to the responsibility of states for injuries to aliens.[101] Where an alien is injured, the offending state is responsible to the claimant state of which the alien is a nation. A state's responsibility ordinarily arises under circumstances because of the state's failure to anticipate and prevent or search for and prosecute the terrorist causing the injury. This is not a rule of per se liability. The same "due diligence" doctrine limits a state's liability for private criminal activity injuring a foreign national.

A state's responsibility to prevent terror exists in wartime circumstances as well. Members of a foreign military force may be sent by their government to assist irregular combatants as advisors or combatants. The question of their status in relation to the established government raises certain fundamental legal issues.

This kind of aid to irregular forces has long been considered intervention and regarded as aggression against the political independence of the established government.[102] Furthermore, a state harboring an irregular force cannot claim to be neutral in the conflict. A concomitant duty requires this state to intern any of these forces within its borders.[103] Where an irregular force has not attained belligerent status, there is no doubt that a foreign state violates international law by assisting, in any manner, an irregular force while being at peace with the legitimate government.[104]

Because international law is primarily a law between states, comparable rights and duties devolve upon neutral states. In the first instance, neutral states are bound by certain duties of abstention; for example, supplying munitions or stationing belligerent personnel of any nation or irregular force on its soil.[105] In the same vein, a neutral must prevent its own citizenry from transforming its neutral territory into a base for war preparations or operations.[106] Finally, they have a duty to prevent their territory from becoming a theater of war through permitting the passage or the stationing of belligerent troops.[107]

Is there an international duty to apprehend and punish or extradite international terrorists so that, when a state fails to fulfill that duty, it violates international law? This area of international law is not as well-defined as those in the preceding paragraph. Where the crime is committed within one state and the terrorist flees to another, any duty to apprehend and punish must be weighed against the doctrines of asylum and extradition.[108] Asylum permits a state to grant a sanctuary to persons who flee to it from another for political reasons. Terrorists invariably invoke a political basis as a reason for their crimes entitling them to refuge. States have absolute discretion in deciding to whom to grant asylum.[109] Thus, the practice of granting asylum to international terrorists has become a hindrance to their apprehension and prosecution.

Extradition of terrorists for prosecution is possible when an extradition treaty exists between states. Extradition, like the granting of asylum, is within the discretion of the state in which the terrorist is found.[110] In the absence of a treaty between the requesting state and the one to which the terrorist has fled, there is no international duty to extradite.[111] Where there is a treaty, the extraditable offenses are normally limited to a specified few. Even if the terrorists' offense for which extradition is sought is among those specified, the "political offense" exception found in most extradition treaties may thwart the terrorists' transfer to the requesting state. While the "political offense" exception can significantly thwart attempts to extradite terrorists, it usually is not invoked for the reason that most international terrorists receive asylum from states whose political ideals match the terrorists' and who have no extradition treaties with states in which the terrorists have committed terrorism.[112] During the past decade, Libya, Syria, and Algeria have granted asylum to numerous international terrorists.[113]

While customary international law and practice afford no recourse, the law of armed conflict establishes a normative practice incumbent upon all ratifying states, including Libya, Syria, Iran, and Algeria. The Geneva law contains an express commitment by all parties to "search for . . . and . . . bring persons [alleged to have committed or ordered "grave breaches"], regardless of their nationality, before its own courts . . . [or] hand such persons over for trial to another High Contracting Party concerned . . ."[114] Thus, "universal jurisdiction" for "grave breaches" replaces or supplements with clear treaty law the underlying international law regarding war crimes.[115]

These treaties require states to "prosecute or extradite" those who commit "grave breaches." Prosecution is either had under a state's municipal criminal law or extradition transfers the offender(s) to another state for prosecution. There is no expressed "political offense" exception to the extradition obligation, but the option of extradition is subject to the requested state's legislative provisions.[116] Thus, where the "political offense" exception is not a treaty rule but a <u>legislative</u> one, the extradition option can be foreclosed.[117] In this case, the prosecution option alone is available for fulfilling the treaty obligation.

Based upon this analysis of our scenario, Mexico could be held liable for terrorism against the United States on any number of grounds. Encouraging, supporting, and subsidizing terrorism is clearly violative of prescriptive norms. Complicity with the terrorists likewise violates international law. This violation may occur before or after the terrorists act. The law, however, requires more than just an unspecified contribution. It must involve a guilty intent.[118] The most likely basis for finding an offense has been committed against the United States is Mexico's permitting acts of terrorism. In these instances, Mexico's failure to use "due diligence" to prevent the terrorists from using its territory is the gravamen. Finally, Mexico's failure to search for and apprehend, and punish or extradite the terrorists violates the same customary international law.

In sum, the law clearly holds a state is responsible for terrorist activities originating from its territory in peacetime or belligerent

conditions. International law will not hold a state liable for all terrorist activities of private groups of persons within it borders on a basis of strict liability. But where there is a causal nexus between its negligent or intentional acts of omission or commission, a state incurs liability. When a state supports international terrorism by allowing terrorists to operate from bases in its territory, it is violating international law.

Protocol I's Effect Upon State Responsibility for Terrorism

Protocol I has had the net effect of condoning terrorism committed under color of claims to self-determination.[119] Furthermore, it confers belligerent status upon national liberation movements and elevates certain kinds of internal armed conflict to the level of international armed conflict. Attaining belligerent status means an irregular force can be legally recognized by other states. This grants not only to irregular forces a mantle of legitimacy and immunity from penal sanctions, but also effectively absolves states from which terrorists operate or find sanctuary from any liability to established governments.

As previously discussed, only forty-seven nations have become parties to Geneva Protocol I. This group is comprised of Soviet bloc and Third World nations. None of these has recently faced an insurgency waged by irregular forces. It remains to be seen whether nations from other than these groups will ratify this treaty.

Sanctions Against Terrorists and State-Sponsors

Recent years have seen the concern over increasing international terrorism translated into the resolve to deter and punish it. Multilateral conventions of most of the world's nations developed a network of treaties designed to punish terrorist acts not committed under the color of state authority. These treaties denounce terrorism perpetrated by groups of criminals. They outlaw hijacking[120] and other threats against civil aviation,[121] offenses against diplomats and other internationally protected persons,[122] and offenses against the taking of hostages.[123] None of these treaties, however, directly affects terrorism committed in armed conflict by military or civilian personnel of a belligerent party.[124] Of course, if there is no existing armed conflict when terrorists act, these treaties may apply.

The enforcement of this treaty law has been, at best, disappointing. There really is no need for a special category of terrorist type crimes since terrorism consists of acts universally condemned as common crimes by every civilized society.[125] A similar failure to enforce municipal law proscribing terrorist acts led to the aforementioned conventions.[126] These cumulative failures have motivated learned authority to suggest expanding the law of armed conflict to cover terrorism.[127]

While up to 1945 the enforcement of international law occurred against states alone, the jurisprudence of the Nuremberg Trials made punishment of individuals feasible. Obtaining an international consensus to hold criminal

trials for international criminals for acts occurring during peace or hostilities has not arisen. That consensus is unlikely to materialize soon in light of the disparate views on criminal justice among nations.

Municipal courts have remained the prosecutorial mechanism for international crimes. Yet even municipal enforcement offers scant possibility since no prosecution of any significance has occurred solely on the basis of an international crime since shortly after World War II.[128] Serious breaches of the Geneva Conventions have occurred in Southeast Asia, the Middle East, and Africa; however, international political considerations make the trial of these offenders and the creation of an international criminal court impossible.

Sanctions against states who support terrorism or whose officers or agents engage in terrorism are well established in international law. These remedies are regarded as civil in nature rather than criminal.[129] The first is the requirement for a state to pay compensation to belligerents for violations of the law of armed conflict. The state is responsible for any damages done by its officials and soldiers in war and peace time.[130] There are two other primary categories of legal responses for states to consider. Diplomatic and economic sanctions comprise one; retaliatory force, the other.

Diplomatic and economic sanctions come in various forms. In addition to claims for compensation already discussed, trade cessation, embargo, quarantine, travel restrictions, landing rights, evacuation of national citizens, foreign citizen deportation, ending diplomatic relations, and freezing foreign assets, are potential responses. A significant drawback is associated with these mostly passive measures. They must achieve a considerable consensus of the international community to be effective. For example, in the wake of the recent terrorist attacks at the Rome and Vienna airports,[131] the United States initially called for economic sanctions against Libya for the latter's support of the attacks.[132] Western European dependence on Libyan oil, however, precludes those nations' cooperation in imposing these sanctions.[133] African and Arab nations will likely not join in these measures, as their active denunciation of Libya would be inconsistent with their support of national liberation movements.

Using force to defend itself or any of its citizens attacked or held hostage by terrorists presents a state with effective, but controversial, sanctions. Self-defense and reprisal are forms of the same generic remedy referred to as self-help. These sanctions are controversial because it is tempting for nations to resort to them when facts and circumstances do not justify their use.

The principle of self-defense involves a state's claim of the right to use proportionate force to engage terrorists in a sanctuary state. This arises when a foreign government is unable or unwilling to perform its obligations to prevent terrorist groups from using its territory as a base or to refrain from supporting, participating, or tolerating terrorist activities.[134] This peacetime use of force is not directed against the foreign state but against an imminent enemy or terrorist threat.[135] This is the type of self-defense claim Israel has made to warrant its attack on PLO strongholds in Lebanon in 1983-4 and Tunisa in 1985.

Anticipatory self-defense has become legally valid use of force in international law.[136] Look at our scenario in which terrorist groups base their operations in Mexico, to attack the United States. The course of these attacks eventually leads to counter action within Mexico's territory by which the United States seeks to destroy the terrorist bases from which previous attacks have originated and to discourage further attacks. This counterattack is not self-defense in the traditional sense because whatever damage occurred earlier cannot now be prevented. But the destruction of terrorist bases represents a proper, proportionate means of defense against future and certain attacks. Article 51, U.N. Charter, precludes the right of retaliation unless an actual armed attack is involved. But it is not the Charter's intention to proscribe anticipatory self-defense, and the traditional right certainly exists in relation to an imminent attack.[137] Moreover, the rejection of anticipatory self-defense is inconsistent with general state practice.

This self-defense remedy is similar to a state's right to use reprisal. The difference lies in their purpose. Self-defense seeks to protect a state's and its citizenry's security. Reprisal, on the other hand, comprises retaliation.

The weight of legal authority appears to make reprisal unavailable in peacetime against non-state actors. The U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, adopted by General Assembly Resolution 2625 (XXV) on October 24, 1970, contains the following: "States have a duty to refrain from acts of reprisal involving the use of force." Further, the International Court of Justice decision in the Corfu Channel Case repudiated reprisal as permissible in the conduct of international relations.[138]

Notwithstanding these edicts, it is arguable that general practice among states has revived reprisal as an acceptable self-help remedy in peacetime. A reprisal is comprised of an otherwise illegal act of one state against another state to compel the latter to settle a difference created by the latter's own illegal act.[139] Any reprisal must be proportionate to the harm done.[140] For instance, a state would not be within legal bounds in incarcerating, as a reprisal thousands of Libyans living in the United States because Libya had denied justice to an American living in Libya. On the other hand, the United States seizure of the Egyptian aircraft carrying the terrorists who had hijacked the Italian cruise ship Achille Lauro constituted a justifiable act of reprisal.

Inasmuch as international injurious acts on the part of administrative and judicial officials, armed forces, and private individuals are not ipso facto international delinquencies, reprisal against an adversary state with respect to such acts is generally impermissible if the adversary state fulfills its international obligation to make reparations.[141] It follows, then, that reprisal against an adversary state with respect to illegal acts such as terrorism for whom that state is not responsible is likewise impermissible.[142]

Reprisals in wartime occur when one belligerent retaliates against another, using means otherwise violative of the law of armed conflict, in order to

compel the latter belligerent to refrain from further illegal acts of warfare and to adhere in the future to the rules of legitimate warfare.[143] This rule presupposes, of course, that a state of belligerency exists between states or between a state and an insurgent or terrorist group that meets the qualifications for belligerents in the law of armed conflict.[144]

The law of armed conflict governs and limits reprisal once the condition of belligerency exists. The Geneva Prisoner of War Convention prohibits reprisals against prisoners,[145] and the Geneva Civilians Convention prohibits any reprisal against civilians "in the hands of a party to the conflict" of which they are not nationals.[146]

Protocol I furthers this trend by outlawing reprisal attacks against all civilians[147] and civilian objects,[148] any objects indispensable to the survival of the civilian population[149] and any public works and installations containing dangerous forces.[150] All noncombatant persons and property are, therefore, legally immune from reprisals. Furthermore, Protocol I limits the only lawful form of reprisal to belligerents in land warfare to the use of an illegal weapon or method of combat directed against enemy combatant personnel. This is contrary to the customary law of armed conflict, which sanctions the burning of villages or towns in reprisal for illegal attacks on soldiers.[151]

As previously examined, Protocol I makes wars of national liberation a matter of international armed conflict when the war is against a government imposing colonial domination, or alien occupation, or involving racial discrimination. Satisfying certain requirements permits the insurgent forces to claim belligerent status. Therefore reprisal raids could be permissible against such insurgent forces under Protocol I. In the event Protocol I fails to attain status as customary international law, reprisals against terrorist liberation groups would violate international law.

SUMMARY AND CONCLUSION

In 1974, Brian Jenkins, the Rand Corporation analyst, was the first person to call terrorism a form of warfare.[152] Since then, others have joined in discussing terrorism in terms of warfare.[153] Secretary of State Schultz is the most recent to do so. In a speech on April 3, 1984, he stated, "State-sponsored terrorism is really a form of warfare. Motivated by ideology and political hostility, it is a weapon of unconventional war against democratic societies."[154] Jumping on the bandwagon to call international, state-sponsored terrorism a form of warfare is as convenient as it is fraught with danger for the United States and its allies.

It is easy, even politically comfortable, to equate international terrorism to warfare. The numbers of terrorist attacks on Americans alone since 1983 is staggering. From the U.S. Marine headquarters and U.S. Embassy bombings in Lebanon to the TWA #847, and Achille Lauro hijackings to the Vienna and Rome airport slayings, terrorism has taken a large number of American lives. The Libyan and Iranian governments have taken credit for or backed terrorist groups responsible for these incidents.[155] Further, these two and other Third World

governments conduct terrorist campaigns to undermine democracies while enjoying the privileges of sovereignty status and the protections of international law. The United Nations provides them a forum where they, along with the PLO, can defend their criminal foreign policies. At the same time, they have access to the World Bank and International Monetary Fund, the International Court, and the Hague and Vienna Conventions.

The threshold question is this. Should terrorism be treated as warfare so that the law of armed conflict will apply to international, state-sponsored terrorism? The United Nations and the general state practice of the Soviet bloc and Third World have moved in that direction.[156] They desire this evolution to shield their wars of national liberation and the terrorist acts they use to prosecute them.

Protocol I was developed to further this evolution. These new rules justify a unilateral resort to armed force to achieve self-determination; they extend the coverage of the 1949 Geneva Conventions to conflicts in which one party is a national liberation movement. The net effect of Protocol I is to legitimize not only wars of national liberation but also to legitimize terrorism, for the record of the last two decades demonstrates that national liberation movements have often resorted to terrorism to achieve their goals.[157]

The purpose of the law of conflict, however, is to establish some minimal standards of conduct between two parties who have resorted to violence to settle their problems. These rules are invoked after conflict has become international in nature to mitigate the suffering of combatants and non-combatants. For example, in the war in Nicaragua between the Sandinista government and the U.S.-backed rebels, there is no need for an expanded law of armed conflict. They are under proper command, wear uniforms, carry arms openly, and conduct their combat operations in accordance with the law. They target the government's armed forces as their military objectives, and control substantial territory. Consequently, the rebels meet the objective legal requirements of the law of armed conflict for belligerency status.

Another predominate argument in favor of Protocol I is that the apprehension and prosecution of terrorists is easier if it is conceded they are acting in a general armed conflict subject to the law of armed conflict. This is posited because the Geneva system includes obligations on its signators to search for and prosecute or extradite persons committing "grave breaches." The International Law Association has embraced this view.[158] It points out there is no logical or reasonable political or legal basis for treating persons not afforded soldiers' privileges by international law a greater leeway for violence than soldiers have.

Even accepting that the law of armed conflict applies to the lowest levels of conflict, the leaders, officials, and soldiers who commit "grave breaches" can legally be prosecuted regardless of their status or lack of status as prisoners of war. Professor Rubin believes their apprehension and prosecution is facilitated by applying the law of armed conflict rather than municipal criminal law.[159] As support for his argument, he cites the Geneva Convention

as obliging signatory nations to prosecute or extradite persons alleged to have committed "grave breaches."[160]

This reasoning misses the point, however. The formalism of the law of armed conflict warrants only exiguous confidence, at best, for Professor Rubin's proposal. Analogizing terrorism to a form of warfare will not change what is obviously the heart of the world community's failure to confront terrorism. And that is its disregard for existing legal mechanisms and its unwillingness to use them to prosecute terrorists. It is a lack of will rather than the lack of a legal regimen that has conferred upon terrorists de facto immunity from prosecution.

Furthermore, it is not in the United States' and its allies' best interests to consider this kind of international terrorism as a lawful form of warfare because of the politico-military and legal consequences that attach. The basis of any approach to the problem of international, state-sponsored terrorism must focus on the criminal nature of terrorism. There are several reasons for this view.

First, the essence of international terrorism is its commission during peacetime, and, even when state authorities condone or cooperate therein, it is in no way the campaign of a recognized belligerent. There is no doubt terrorism can occur during international armed conflict. But any terrorist acts would be treated as a war crime during a recognized belligerency.

The Third World, the PLO, and other irregular groups, proclaim war against Western democracies and seek the advantages inherent in claiming soldier status. Protocol I attempts to leverage these nations and organizations and their wars of national liberation into a more advantageous position. The Protocol eliminates the necessity for a rebel group's showing the success as would require the application of the law of armed conflict.[161] The import of this is that these organizations' members will be considered in all respects privileged combatants entitled to prisoner of war status if apprehended.

Undue conceptual and legal confusion results if terrorist acts are construed as in any way related to the law of armed conflict. The argument that humanitarian reasons suggest the need for relaxing the minimum requirements of the law of armed conflict for armed irregular forces is an attractive one. The increasing trend toward warfare conducted by irregular groups appears to indicate a common sense need to adopt new law. But the proposed change to relax these requirements is unlikely to result in greater protection for irregular combatants. If a state's armed forces must expect that, in combat zones and occupied territories, civilians by day will become irregulars at night, those forces will probably cease distinguishing between genuine noncombatants and unprivileged irregulars in civilian clothes.[162] The outcome will be that the entire civilian enemy population will be treated as belligerents.

There is another danger in applying the law of armed conflict to terrorism. It is in substituting pedestrian opinion or political passions for the rule of customary international legal norms. As we have seen the diplomatic remedies,

economic sanctions and reparations, and use of military force are available against states even in peacetime.[163] There are ample treaties and laws to condemn, suppress, and prosecute state-sponsored terrorism without any reference to the law of armed conflict.

The law of armed conflict is neither intended to be a body of criminal statutes nor serve any direct function as such. These legal norms serve as legal obligations binding on states. States, in turn, have obligations under international law, including specific treaty obligations, to implement and enforce against their own combatant personnel the obligations that arise under international law regulating armed conflict. Applying the law of armed conflict to outlaw state-sponsored terrorism will not make the slightest difference in ending terrorist acts. Many states have been remiss under their current obligations to prosecute or extradite terrorists. It does not follow, then, that applying the law of armed conflict will rectify their derelictions.

International terrorism and state-sponsored terrorism are not conducted according to the niceties of the law of armed conflict, or any law for that matter. Terrorism of these kinds do not fit into a set of rules enforceable through a Geneva convention. The terrorist kidnapping of Soviet diplomatic personnel in Lebanon in 1985 provides an opportunity for increased cooperation between the West and the Soviet Union to squelch terrorism. The instruments exist and the law is clear. The fight against terrorism is a battle outside of the law of armed conflict. The United States must obtain the assistance of other nations to extradite terrorists and to treat law enforcement as a routine aspect of our foreign relations. It must also support, militarily and politically, governments and forces that are fighting terrorist groups and campaigns.

To the extent that the United States and other Western democracies are under terrorist attack, it becomes another problem to confront and deal with within a wider foreign policy. That foreign policy must resist all political, diplomatic, and legal efforts seeking recognition of terrorism as a lawful form of warfare. As satisfying as it might be, it is not reasonable for the United States to go to war or take reprisals against Libya, or Syria, or Iran in the absence of a consensus among its own allies about the objectives of such measures. And declaring war against any Arab state will surely confer legitimacy and lawful combatant status upon the very terrorists whose activities America seeks to end. This conundrum is likely to continue so long as the United Nations and the majority of its member states consider the reasons for terrorism more important than the acts of terrorism.

FOOTNOTES

1. O. Demares, Brothers in Blood 196 (1977) [hereinafter cited as Brothers in Blood].

2. Report of the Sixth Committee of the General Assembly, U.N. Doc. A/C.6/418, Corr.1,2 & Add.1 (1972).

3. See C. Sterling, The Terror Network (1981) [hereinafter cited as The Terror Network]. Sterling not only compiled considerable evidence of Soviet orchestration and financial backing of terrorist ventures, she aptly criticized Western governments for their uniform reluctance to expose the Soviet cooperation that underlies most international terrorist activities. Id. at 291-94. See also Livingstone, "Fighting Terrorism and 'Dirty Little Wars'," Air University Review, 1984, at 6-7. International terrorism received some of its earliest treatment as a form of warfare in B. Jenkins, International Terrorism: A New Kind of Warfare, RAND 5261 (1974) [hereinafter cited as International Terrorism]. See also, Implementation of the Helsinki Accords: Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II, 97th Cong., 2d Sess. 20 (1981) (Statement of Michael A. Ledeen) ("[M]any terrorist organizations get support from the Soviet Union and its many surrogates around the world. . . . The Russians train PLO terrorists in the Soviet Union, supervise the training of terrorists from all over the world in Czechoslovakia. . ., and work hand in glove with countries like Libya, Cuba, and South Yemen in the training of terrorists."); Barron, KGB Today: The Hidden Hand, 21-22, 255-257 (1983); See also, Patterns of International Terrorism: 1981, U.S. State Dept. in Terrorism, Political Violence and World Order 15, 31-2 (Han ed. 1984) [hereinafter cited as Terrorism and Political Violence].

4. Report of the Department of Defense Commission on the Beirut International Airport Terrorist Act, (1983), at 128.

5. Id; See also Lambeth, Uncertainties for the Soviet War Planner, 4 Int'l Security 22, 34 (1979).

6. Cf. A. Monks, Soviet Military Doctrine: 1960 to Present 208-29 (1984).

7. Id.

8. Motley, Terrorist Warfare Formidable Challenges, 9 The Fletcher Forum 297, 300 (1985). There is no doubt the Soviet Union sponsors "wars of national liberation" in the Third World, and they make no attempt to evade this truth.

See, e.g., N.Y. Times, Feb. 9, 1981, at A3, col. 4, referring to a Soviet diplomatic note to the United States defending the Soviet's right to assist liberation movements.

9. Id. at 301.

10. See President Reagan's Message to the Congress, Apr 26, 1984, quoted in 72 Dept. State Bull. 65 (1984), in which the President cited the attacks on the United States' diplomatic corps, military forces and those of our allies in Beirut, Rangoon, and Kuwait as "state terrorism" severely challenging to America's foreign policy. See also Terrorism and Political Violence, supra note 3, at 31.

11. Murphy & Brady, The Soviet Union and International Terrorism, 16 Int'l Law 139 (1982) (hereinafter cited as The Soviet Union and International Terrorism); Friedlander, Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?, 13 Case W. Res. J. Int'l L. 281, 284 (1981) (hereinafter cited as Terrorism and National Liberation Movements). In the U.S. War on Terrorism, Iran is the Enemy, The Heritage Foundation Backgrounder, No. 452, (1985).

12. See Bassiouni, Terrorism, Law Enforcement, and the Mass Media: Perceptives, Problems, Proposals, 72 The Journal of Criminal Law and Criminology 1 (1981), for statistical analyses of terrorist acts. The writer cites the Basque, Irish, Corsican, Croatian, and Moluccan separatist movements as non-Marxist terrorist groups.

13. In 1965, the United Nations General Assembly supported a resolution in which it declared that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another state . . . " 20 U.N. GAOR Supp. No. 14/A/6014, 1965, at 11. The United States followed in the wake of the Arab terrorist killings of Israeli Olympic competitors with a draft of an international terrorism convention presented to the U.N. Ad Hoc Committee on International Terrorism, the rejection of which was resounding. See The Soviet Union and International Terrorism, supra note 11, at 143-44 (1982), and MicKoulus, Multilateral Legal Efforts to Combat Terrorism, 6 Ohio N. U. L. Rev. 13 (1979). In 1974, the General Assembly adopted Resolution 3103 proclaiming that "armed conflicts involving the struggle of peoples against colonial and racist regimes are to be regarded as international armed conflicts . . . " G.A.Res. 3103, U.N. GAOR Supp. No. 30/A/9030, 1974, at 142. This resolution

has often been invoked as the legal support legitimatizing terrorist groups and their activities inasmuch as no distinction was drawn between wars of self-determination and terrorist acts. The U.N. General Assembly added to the confusion when it adopted a definition of aggression which excludes terrorist campaigns waged on behalf of liberation movements. G.A.Res. 3314, 28 U.N. GAOR Supp. (No. 3A) at 142, U.N. Doc. A/90930/Add. (1974). For more discussion, see text accompanying notes 69-89 infra.

14. See Gellman, Though Terrorism May be Hard to Define, This Administration Takes It Seriously, 13 National Journal 1631 (1981).

15. See Williams & Chatterjie, Suggesting Remedies for International Terrorism - Use of Available International Means, 5 Int'l Relations 1069, 1071-73 (1976).

16. See Paust, Terrorism and the International Law of War, 64 Mil. L. Rev. 1, 3 (1974) [hereinafter cited as Terrorism and the Law of War].

17. Id. at 3-4.

18. Id. at 4.

19. Id.

20. P. Wilkinson, Terrorism and the Liberal State 174 (1978) [hereinafter cited as Terrorism and the Liberal State].

21. Hague Convention IV, Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as H.C. IV].

22. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No, 3362, 75 U.N.T.S. 31 [hereinafter cited as First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter cited as Fourth Geneva Convention].

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23. See D. Bindschedler, A Reconsideration of the Law of Armed Conflict 12 (1971) [hereinafter cited as A Reconsideration of the Law of Armed Conflict].

24. The law of armed conflict in the field has consisted of the Law of the Hague and customary international law. Governments have resisted codification efforts, leaving the development of the law to custom. See Aldrich, New Life for the Law of War, Am. J. Int'l L. 764, 777 (1981).

25. Id. at 777.

26. U.N. Charter art. 1.

27. U.N. Charter art. 51.

28. A Reconsideration of the Law of Armed Conflict, supra note 23, at 16.

29. See 2 L. Oppenheim's International Law 370 n.1 (Lauterpacht ed., 7th ed. 1952) [hereinafter cited as Oppenheim]; U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare (1956), para. 11 [hereinafter cited as F.M. 27-10].

30. A Reconsideration of the Law of Armed Conflict, supra note 23, at 16.

31. Id.

32. A Reconsideration of the Law of Armed Conflict, supra note 23, at 42.

33. 2 Oppenheim, supra note 29, at 524; Skubiszewski, Use of Force by States, Collective Security, Law of War and Neutrality, in Manual of Public International Law 801-822 (Sorensen ed. 1968); F.M. 27-10, supra note 29, at para. 221(b). The latter provides that direct attacks against non-combatants and attacks for the purpose of terrorizing are forbidden. See also A Reconsideration of the Law of Armed Conflict, supra note 23, at 42. Support for this peremptory prohibition of the terrorization of non-combatants appears to come from these authorities: Professor Baxter, Professor Freymond, M. Greenspan, Professor Levie, J. Pictet, and G. Schwarzenberger. The recent divergence on this point arises over the proper means to attain political goals. Supporters of wars of national liberation and self-determination efforts ignore the point that the ends do not justify the right to use any means, including terrorism, to achieve their goals.

34. H.C. IV, supra note 21, art. 22; A Reconsideration of the Law of Armed Conflict, supra note 23, at 16.

35. Cf. 2 Oppenheim, supra note 29, at 218.

36. H.C. IV, supra note 21, art. 22. Another view is that the rule prohibiting indiscriminate attacks is simply another aspect of the proportionality principle and no attack can be indiscriminate if it fails to produce civilian casualties disproportionate to the expected military advantage. See Carnahan, Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry, 18 A.F.L. Rev. 32, 43 (Winter 1976). The Protocols Additional to the Geneva Conventions of 1949 (Protocols I & II), opened for signature Dec. 12, 1977, reprinted in 16 Int'l Legal Materials 1391, 1442 (1977) [hereinafter cited as Protocol I, II]. Protocol I, art. 46, para. 3, adopts the view in its text that this rule is distinct from the proportionality rule.

37. H.C. IV, supra note 21, art. 22.

38. F.M. 27-10, supra note 29, para. 6.

39. Geneva Convention, supra note 21, art. 34; F.M. 27-10, supra note 29, para. 497g.

40. M. Greenspan, The Modern Law of Land Warfare 55-6 (1959) [hereinafter cited as The Modern Law of Land Warfare]; F.M. 27-10, supra note 29, para. 11.

41. The Modern Law of Land Warfare, supra note 40, at 32-8; 2 Oppenheim, supra note 29, at 202. It is important to recognize that belligerency is rarely achieved anymore through a declaration of war. Article 2 of the Geneva Conventions contains the language "any other armed conflict" in making the Geneva law applicable where no declaration of war is made. Professor Paust cogently argues that this language could involve the recognition of the existence of a state of war (something less than a formal declaration) or even the mere de facto existence of an armed conflict absent any recognition of a state of war. The weight of authority holds that it is the factual existence of an armed conflict which is important and not the recognition of a state of war. See Paust, Legal Aspects of the My Lai Incident: A Response to Professor Rubin, 50 Ore. L. Rev. 138, 140-42 (1971).

42. 2 Oppenheim, supra note 29, at 369 n.6; F.M. 27-10, supra note 29, para. 6. The minority view requires at least one belligerent recognize a state of war exists. See Rubin, Legal Aspects of the My Lai Incident, 49 Ore. L. Rev. 260 (1970).

43. F.M. 27-10, supra note 29, para. 6.

44. Id. at paras. 7, 8.

45. Id.

46. 2 Oppenheim, supra note 29, at 248-53.

47. Id.

48. Protocol I, supra note 38, art. 1 (4).

49. As previously alluded to, international law is generally unconcerned with matters touching the interests of a single nation; however, when the interests of a second state are affected, an event becomes an international law matter.

50. Fourth Geneva Convention, supra note 22, art. 33; Cf. 2 Oppenheim, supra note 33, at 370 n.1; F.M. 27-10, supra note 29, para. 11a.

51. First Geneva Convention, supra note 22, art. 50; Second Geneva Convention, supra note 23, art. 51; Third Geneva Convention, supra note 23, art. 130; Fourth Geneva Convention, supra note 23, arts. 85-86. The International Military Tribunal at Nuremberg expanded the list of war crimes to include plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. For a discussion of these, see Hassan, The Theoretical Basis of Punishment in International Criminal Law, 15 Case W. Res. J. Int'l L. 39 (1983).

52. Third Geneva Convention, supra note 23, art. 130; Fourth Geneva Convention, supra note 23, arts. 85-6.

53. See Baxter, The Municipal and International Law Basis of Jurisdiction Over War Crimes in 2 A Treatise on International Criminal Law 65 (M. Bassiouni & V. Nanda eds. 1973).

54. H.C. IV, supra note 21, art. 23; F.M. 27-10, supra note 29, paras. 28-34, 41.

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55. H.C. IV, supra note 21, art. 23; F.M. 27-10, supra note 29, paras. 28-34, 41; contra Paust, An Approach to Decision With Regard to Terrorism, 7 Akron L. Rev. 397, 400 (1974).

56. Third Geneva Convention, supra note 22, art. 4; H.C. IV, supra note 22, art. 11.

57. In international law, the term "municipal" is used to designate the law of an individual state, rather than referring to the affairs of American cities and towns.

58. Cf. Terrorists and Guerrilleros, supra note 80, at 81-2.

59. Ex parte Quirin, 317 U.S. 1, 36 (1942). See also Colepaugh V. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957). Generally American courts permit an accused criminal to allege his entitlement to prisoner of war status and hear argument on the allegation's merit.

60. A Reconsideration of the Law of Armed Conflict, supra note 23, at 42.

61. First Geneva Convention, supra note 22, art. 13; Second Geneva Convention, supra note 22, art. 13; Third Geneva Convention, supra note 22, art. 4; Fourth Geneva Convention, supra note 22, art. 4.

62. Geneva Protocol I, supra note 38, arts. 43-7.

63. Id., art. 1(4).

64. Id., art. 44(4).

65. See text accompanying text at notes 69-89 infra.

66. F.M. 27-10, supra note 29, para. 499. International terrorism committed in non-international armed conflicts are commonly considered war crimes. See Terrorism and the Liberal State, supra note 20, at 65 (1978). Contra Solf and Cumminings, A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949, 9 Case W. Res. J. Int'l L. 205, 215-16 (1977) [hereinafter cited as A Survey of Penal Sanctions].

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67. A Survey of Penal Sanctions, supra note 66, at 206.

68. 2 Oppenheim, supra note 29, at 190-93.

69. Terrorism and National Liberation Movements, supra note 11, at 288. See also text accompanying note 13 supra. We tend to forget the phrase "wars of liberation" is derived from Premier Nikita Kruschev's address of 6 January 1961, an extract from which follows: "Liberation wars will continue to exist as long as imperialism exists, as long as colonialism exists. These are revolutionary wars. . . . What is the attitude of the Marxists toward such uprisings? A most positive one. . . . [I]n these uprisings the people are fighting for implementation of their right of self-determination, for independent social and national development. These are uprisings against rotten reactionary regimes, against the colonizers. The Communists fully support such just wars and march in the front rank with the peoples waging liberation struggles." (Premier Nikita Kruschev's Address to Higher Party School, Social Sciences Academy, Institute of Marxian-Leninism of the Central Committees, Communist Party of the Soviet Union, 6 January 1961.)

70. U.N. Charter art. 2, para. 4.

71. Id. art. 1.

72. Mueller, Foreward, Terrorism and Criminal Justice ix (R. Crelinsten, D. Laberge-Altmejd, & D. Szabo eds.) (1978).

73. Van Dyne, The Adventures of I. F. Stone, The Chronicle Rev., Feb. 5, 1979, at 5, col. 2.

74. The U.N. definition of aggression approved in 1974, supra note 13, essentially legitimatized political terror when committed in the name of self-determination against colonial or racist regimes. The U.N. majority thus views terrorist means as permissible measures to achieve these ends, which happen to coincide with Third World and Soviet desires. This view contradicts the pledge many of these same nations made as signatories of the Helsinki Declaration to "refrain from direct or indirect assistance to terrorist activities." As Professor Verwey has noted, there exists considerable doubt, even among the 83 nations supporting the Resolution, whether the claim formulated has developed into a rule of customary law. Verwey, The International Hostages Convention and National Liberation Movements, 75 Am. J. Int'l L. 69 (1981) [hereinafter cited as The International Hostages Convention].

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75. MacGibbon, Customary International Law and Acquiescence, 33 Brit. Y.B. Int'l L. 137 n.5 (1958).

76. See generally Terrorism and the Law of War, supra note 16, at 8; Terrorism and National Liberation Movements, supra note 11, at 282; Paust, My Lai and Vietnam: Norms, Myths, and Leader Responsibility, 57 Mil. L. Rev. 99, 128 (1972) [hereinafter cited as My Lai and Vietnam].

77. Response to Ad Hoc Committee on International Terrorism submitted by the Syrian Republic, U.N. Doc. A/AC. 160/1, at 36 (1973).

78. Protocol I, supra note 38, art. 1., para. 4.

79. Id.

80. Baxter, Modernizing the Law of War, 78 Mil. L. Rev. 165, 173 (Fall 1977).

81. Cf. Schwarzenberger, Terrorists, Guerrilleros, and Mercenaries, 71 Toledo L. Rev. 71, 81-2 (1971) [hereinafter cited as Terrorists and Guerrilleros]; O. Heilbrunn, Partisan Warfare 78 (1962).

82. Cf. Terrorists and Guerrilleros, supra note 81, at 81-2; Terrorism and the Law of War, supra note 16, at 8, n.11.

83. See the discussion of the United Nations General Assembly's Resolution 3103, in note 15 supra.

84. While U.N. General Assembly Resolutions are not legally binding international law, one can find in them the expression of general opinion of states on certain subjects. See Note, Custom and General Principles as Sources of International Laws in American Federal Courts, 82 Colum. L. Rev. 751, 772-74 780-83 (1982), in which courts are admonished not to find violations of international law primarily from the resolutions and declarations of multinational bodies since they may not constitute customary international legal practice.

85. A Reconsideration of the Law of Armed Conflict, supra note 23, at 41.

86. Id.; Terrorism and the Law of War, supra note 16, at 11-12; Cf. Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 851, 858 (1967).

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87. A Reconsideration of the Law of Armed Conflict, supra note 23, at 41.

88. Id.

89. 2 Oppenheim, supra note 29, at 218.

90. 2 Oppenheim, supra note 29,at 698, 704, 751-54.

91. Id. at 752. For a significant treatment on this subject, see Brownlie, International Law and the Activities of Armed Band, 7 Int'l & Comp. L. Q. 712 (1958) [hereinafter cited as Activities of Armed Bands] and Lillich and Paxman, State Responsibility for Injuries to Aliens Occassioned by Terrorist Activities, 26 Am. U. L. Rev. 217 (1977) [hereinafter cited as State Responsibility for Injuries].

92. 8 Whiteman, Digest of International Law 751 (1968).

93. Id.

94. Id.

95. Id. at 752.

96. Id. at 753.

97. Activities of Armed Bands, supra note 91, at 729.

98. Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 1, 20-1 (1972).

99. Id.

100. Id.

101. See generally 1 P. Jessup, A Modern Law of Nations 94-122 (1948).

102. 2 Oppenheim, supra note 29, at 660.

103. H.C. IV, supra note 21, art. 11.

104. Id.

105. 2 Oppenheim, supra note 29, at 656.

106. Id.

107. Id.

108. State Responsibility for Injuries, supra note 101, at 298.

109. Id.

110. Id. at 300.

111. Id. at 301.

112. Id. at 303. The "political offense" exception was introduced into extradition treaties in the mid-1800's to permit states to grant asylum to the participants in revolutionary and civil wars.

113. Id. at 276-80.

114. Solf, International Terrorism in Armed Conflict, in Terrorism and Political Violence, supra note 3, at 468.

115. First Geneva Convention, supra note 22, art. 49; Second Geneva Convention, supra note 22, art. 50; Third Geneva Convention, supra note 22, art. 129; Fourth Geneva Convention, supra note 22, art. 146. "Grave breaches" are those categories of offenses for which personnel can be indicted: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, taking of hostages, or wanton destruction and appropriation of property not justified by military necessity. See note 72 supra.

116. Solf, International Terrorism in Armed Conflict, in Terrorism and Political Violence, supra note 3, at 468.

117. Id. There is an inchoate consensus among international legal authorities that international terrorism comprises an "exception" to the political exception rule. This based on the notion that acts which are per se common crimes and violate the law of armed conflict, cannot properly be considered a political offense. See Evans, The Apprehension and Prosecution of Offenders:

Some Current Problems in Legal Aspects of International Terrorism 493 (A. Evans & J. Murphy eds. 1978). This writer had found no cases in which extradition was requested or granted for an international crime other than for those arising from WW II. Likewise there were no cases where after asylum was granted, a state had found an "exception" to the political exception doctrine and extradited a criminal.

118. The Modern Law of Warfare, supra note 40 at 35.

119. See text accompanying notes 52-54, 69-89 supra. For an excellent review of the adverse affects of self-determination on the terrorism process, see Friedlander, Terrorism and Self-Determination: The Fatal Nexus, 7 Syracuse J. Int'l L. 263 (1979). See also Green, The Legalization of Terrorism, in Terrorism: Theory and Practice 175-97 (Y. Alexander, D. Carlton, & P. Wilkinson eds. 1979).

120. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641; T.I.A.S. No. 7192.

121. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.

122. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1955, T.I.A.S. No. 8532.

123. International Convention Against the Taking of Hostages, adopted Dec. 17, 1979, G.A. Res. 34/136, 34 U.N. GAOR Annex, U.N. Doc. A/34/819, at 5 (1979), reprinted in The International Hostages Convention, supra note 74, at 86.

124. Id. at art. 12.

125. Friedlander, The Enforcement of International Criminal Law: Fact or Fiction?, 17 Case W. Res. J. Int'l L. 79, 88 (1984).

126. Cf. The International Hostages Convention, supra note 74.

127. See, e.g., Rubin, Current Legal Approaches to International Terrorism, 7 Terrorism 147, 153-56 (1984).

128. Bassiouni, The Political Offense Exception in Extradition Law and Practice, in International Terrorism and Political Crimes 398 (M. Bassiouni ed. 1975).

129. Professor Kutner ably and forcefully argues that, since heads of state and chief executives are responsible for securing observance of laws, they should be treated as principals to any terrorist acts planned in or committed on their territory. His theory is based upon the constructive notice that state leaders should be aware of affairs within their states' territorial domain. Kutner, Constructive Notice: A Proposal to End International Terrorism, 19 N.Y.L. Forum 325, 341-43 (1973).

130. H.C. IV, supra note 21, art. 3; 2 Oppenheim, supra note 29, at 592-95; 1 L. Oppenheim's International Law 163 (H. Lauterpacht ed., 8th ed. 1955). Leaving aside the implications which would arise were a national liberation movement to attain belligerency status, a sound legal argument exists that those state governments who assist terrorist groups are liable for a proportionate share of the injuries incurred by innocent civilians at the hands of terrorists.

131. Boyd, Note Carried by Terrorist Calls Airline Raids Response to Israel's Bombing of PLO, N.Y. Times, Dec. 29, 1985, at A1, cols. 5-7.

132. Gwertzman, U.S. Backs Away from Asking West for Curb on Libya, N.Y. Times, Jan. 10, 1986, at A1, cols. 6-8.

133. Weinraub, Response to Terrorism: How the President Decided, N.Y. Times, Jan. 12, 1986, at A1, cols. 5-6.

134. 2 Oppenheim, supra note 29, at 678-80, 751-54.

135. Id. The United States justified its Cambodian incursions to attack Viet Cong and North Vietnamese combatants and their sanctuaries on this principle. See Paust, A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action, 5 Ga. J. Int'l & Comp. L. 431, 466-67 (1975).

136. Similarly international law has always recognized a state's right to use force to protect its citizens who live abroad from harm. Israel's Entebbe raid is an example of the use of self-help and humanitarian intervention.

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137. D. Bowett, Self-Defense in International Law 187-93 (1958).

138. Judgement in the Corfu Channel Case, ICJ Rep. (1949), at 4.

139. Cf. The Modern Law of Warfare, supra note 40, at 410; G. von Glahn, Law Among Nations 498-504 (1965) [hereinafter cited as Law Among Nations].

140. Law Among Nations, supra note 139, at 500. Reprisals must not be started until attempts at peaceful settlement are tried. Reprisals must cease as soon as the state's offending practice(s) cease (or reparations are agreed to), must not be employed against reprisals, must not injure third parties except incidentally, and must be proportional to the original injury suffered.

141. 2 Oppenheim, supra note 29, at 137.

142. Id.

143. Id. at 561.

144. See text accompanying notes 40-47 supra.

145. Geneva Convention III, supra note 22, art. 13.

146. Geneva Convention IV, supra note 22, art. 33.

147. Protocol I, supra note 38, at art. 46.

148. Id. at art. 47.

149. Id. at art. 48.

150. Id. at art. 49.

151. 2 Oppenheim, supra note 29, at 565.

152. International Terrorism, supra note 3.

153. See, e.g., The Terror Network, supra note 3, at 151. Many of the terrorist groups have proclaimed they are at war with the existing political and social way of life of individual states and Western democracy itself. See also Brothers in Blood, supra note 1, at 184.

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154. Toth, U.S. Acts to Curb Terrorism Abroad, Los Angeles Times, Apr. 15, 1984, p. 1, cols. 3-5.

155. Johnson, Wanted: World War on Terror, The Times (London) 10 (Aug. 10, 1984).

156. See text accompanying notes 48-68 supra.

157. Terrorism and National Liberation Movements, supra note 11, at 282-84.

158. See An Interim Report on 'War,' 'Armed Conflict,' and 'Terrorism,' in Terrorism and Political Violence, supra note 3, at 155-58.

159. Rubin, Terrorism and the Laws of War, 12 Den. J. Int'l L. & Pol'y 219, 231 (1983).

160. Id. Professor Rubin cites the Thrid Geneva Convention, supra note 22, art. 129.

161. H.C. IV, supra note 21, art. 3. See text accompanying notes 40-47 supra.

162. Terrorists and Guerrilleros, supra note 80, at 80-1.

163. See text accompanying notes 124-150 supra.

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